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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 193

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant,

vs.

O. N. LINDELL,

Appellee.

ON CERTIFICATE OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

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Since the appellant's original brief herein was filed with the Clerk, the Circuit Court of Appeals for the Eighth Circuit decided the precise question here involved and entered an opinion, filed November 15th, 1929, in the case of *Fullerton Lumber Co.* v. *Chicago, M. St. P. & P. R. R. Co.,* (not yet reported), sustaining appellant's contention upon the question herein certified to this court. We quote the material portion of the opinion:—

> "On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the freight charges, and we think this con-

forms to the intent of congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers the whole intent and purpose of congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers the suits would inevitably open the door to gross discriminations under the color of counterclaims and offsets which the courts could not prevent. In fact, a measure of discrimination is present as soon as a counterclaim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counterclaims or offsets and then they cannot be adjudged to pay their freight charges until all such matters of counterclaim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose the practice should not be permitted even though there is a statute of the state sanctioning counterclaims generally in law actions."

In its opinion the Circuit Court of Appeals cites with approval the cases supporting appellant's contention, including the recent case of *Pennsylvania R. R. Co.* v. *So. Car. Produce Ass'n.*, 25 Fed. (2nd) 315; and cites with disapproval the decisions to the contrary.

Counsel have referred, at page 2 of their brief, to the fact that in this case "collection of transportation charges has not been made, *and cannot be made except through suit* * * *." (Italics are ours.) The carrier is not charged with any violation of duty in making delivery of the shipment without such collection. The reason why such collection cannot be made is because of the persistent refusal of appellee to comply with the provisions of the Transportation Act of 1920. (41 Stats. 479, U. S. Code, Title 49, Ch. 1, Sec. 3, Sub. 2.) Prompt payment of charges in all cases is required. Congress has made no exception to apply where a damage claim is asserted. Nor is it the function of the courts to create such exceptions. The correctness of this rule has been repeatedly announced by the decisions of this court, and was applied to the Hepburn Act in the case of *Louisville, etc. R. R. Co.* v. *Mottley*, 219 U. S. 467. The court there said (at page 474):—

> "It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute. * * * That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. * * * The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the supreme law of the land."

Appellee was under a duty to pay his freight charges within ninety-six hours of delivery of the shipment. This he has not done. On the contrary, a delay of four years and three months has already taken place.

Appellee has referred to the "red tape", and to a host of imaginary evils which he believes will be the result of

denying the shipper this right of counterclaim and setoff. This is a mere restatement of the argument of convenience referred to in some of the cases. If a shipper pays his freight at once (as we contend the law requires), there can be no occasion for setting off judgments. Extension of credit is not allowed at present (except under the regulations of the Commission). The shipper should pay his charges at once without raising a dispute upon any collateral issue. He is then free to assert whatever claim he may have for damage sustained to the shipment. He has a remedy under the Carmack Amendment (34 Stats, 594, U. S. Code, Title 49, Ch. 1, sec. 2, sub. 11) which permits him to sue either the inital or the terminal carrier and obtain full compensation for his loss. Any question of hardship is disposed of by this court's opinion in the *Mottley* case, *supra*. The suggestion of hardship, and the argument of convenience are both beside the point and must yield to the policy of Congress.

Respectfully submitted,

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